states contended for permanent representation on the proposed court for the great powers. Members from the smaller states insisted upon equality. Elihu Root, in what may some day be regarded as the crowning achievement of his career, piloted the committee to a satisfactory compromise. Taking advantage of the existing League organization, and ably seconded by Lord Phillimore, Mr. Root proposed a small court elected by the concurrent vote of the League Council, in which the great powers are dominant, and the League Assembly, in which all powers are represented equally. This proposal was accepted and became the basis for the plan eventually adopted.

The Court will consist at the outset of fifteen members, eleven judges and four deputy judges. The members are to be elected from a list of candidates nominated by the national groups which constitute the panel of the so-called Permanent Court of Arbitration. Each national group may nominate two candidates. If the Council and Assembly fail to agree on fifteen members after three sittings, a small conference committee, called a Committee of Mediation, will attempt to agree upon candidates to be recommended for the unfilled positions. If this does not result in an election, the members already elected to the Court may fill the vacancies by selection from among the candidates who have received votes in either the Council or the Assembly. Election is for nine years and members are eligible for reëlection. While national political office is declared incompatible with a position on the Court, it seems to have been the opinion of the advisory committee that this should not disqualify members of national courts or legislative bodies. If a state which is party to a controversy submitted to the Court has no national on the Court, it is assured the right to name a judge who shall sit during the trial and disposition of that particular controversy. The Court will sit at The Hague.

The plan naturally makes a few concessions to the civil law countries for which the justification is none too obvious to lawyers trained in a different system. There are several features which seem open to criticism, notably the provision which makes French the sole official language and the method of nominating candidates. These, however, are after all secondary matters which may be amended as experience suggests. The project on the whole is a remarkable one and one that does credit to the sagacity and statesmanship of the jurists who labored on the advisory committee. This project alone, it is believed, would more than justify the retention of the existing organization of the League. E. D. D.

PRICE REGULATION BY THE STATE AND INTERSTATE COMMERCE.—The litigation which has resulted from a recent attempt of the State of Indiana to regulate the price of coal should lead to a determination of the extent of three important but very general principles of police power. The first and most important of these, from the point of view of this discussion, is that the State has the power to regulate returns of businesses "affected with a public interest." In the first attack upon the Indiana law, it was held that the business of mining and selling coal under existing economic conditions

was within this class.[1] At this time, the commission created by the act had not entered upon the performance of its duties and several questions arising under sections of the bill concerning these duties were deemed premature. These sections, however, and subsequent orders of the commission pursuant thereto, have raised the question as to the extent of the remaining principles referred to. The first of these is that the State may do whatever is reasonably necessary to render effective a valid exercise of the police power. The other is that an otherwise valid exercise of the police power may be sustained, despite the fact that it incidentally interferes with interstate commerce, in the absence of conflicting Federal legislation. The language in which these principles have been stated in numerous cases, literally applied, would sustain the provisions of the Indiana law under discussion. It may be conceded at once, however, that they have never been applied to a situation closely analogous to that which arises under the coal law.

In order to prevent reducing to a nullity the power to regulate prices, the law attempts to insure an available supply of coal at the prices fixed by empowering the commission to apportion among the operators the amount necessary for domestic purposes, except for manufacturing, and to require each to produce and offer for sale each month his proportion of the whole, with forfeiture of the license provided for by the act as a penalty for disobeying the orders of the commission, and a severe penalty for mining coal without a license. The validity of this portion of the act was successfully attacked in *Vandalia Coal Co.* v. *The Special Coal and Food Commission of Indiana,*[2] the District Court of the United States for the district of Indiana holding that these sections of the act constituted a direct interference with interstate commerce, inasmuch as coal severed from the ground becomes an article of commerce and the owner of the commodity has a right, so far as the State is concerned, to sell and to contract to sell his entire output to citizens of other States, and that this right cannot be interfered with by compelling the sale of a certain amount in the State. The court also indicated that, aside from the interstate commerce question, the State has no power to compel the production and sale of coal by imposing the alternative of quitting business.

Before the principle relating to interstate commerce can become involved, there must obviously be an otherwise valid exercise of the police power which affects interstate commerce incidentally. So here, the question as to the validity of compulsory production and sale, enforced through the alternative of compelling a cessation of the business of mining, must be determined in favor of the State before it becomes worth while to consider the effect on interstate commerce. In view of the evident purpose of these sections of the act to make price regulation a benefit rather than a detriment to the people of the State, their validity would seem to depend on the application of the second principle: whether they can be said to be reasonably necessary to make effective a valid exercise of the police power.

[1] American Coal Mining Co. v. Special Coal and Food Commission of Indiana, —— Fed. —— (D. C. Ind., Sept. 6th, 1920). Discussed in 19 MICH. L. REV. 74.

[2] —— Fed. —— (D. C. Ind., Nov. 27th, 1920).

Examples of the applications of this principle which seem to bear directly upon the present problem are to be found in the cases of *New York ex rel. Silz* v. *Hesterburg*,[3] and *Sligh* v. *Kirkwood*.[4] In the former, a law providing a punishment for the possession of imported game during the closed season was held valid in order to protect the local game, admittedly a valid exercise of the police power. In the latter, a Florida statute prohibiting the shipment of unripe citrus fruits out of the State, in order to protect the citrus fruit industry of the State, was upheld. These cases illustrate the principle.

Conceding that the business of mining and selling coal is "affected with a public interest," so that prices may be regulated,[5] the valid exercise of the police power exists. To sustain these measures, it must be shown that they are reasonably necessary in order to render price regulation effective. It requires little imagination to predict the result of a measure providing merely for the regulation of the price of coal, with no means of compelling the sale of coal at that price. Coal in the particular State would simply disappear from the market, either going to States where the seller is not compelled to accept reasonable prices for his product, or, where possible, being stored until the law is recognized as an economic impossibility, and prices, of necessity, rise to their old level. Nearly three hundred years ago Parliament passed a law[6] providing for the regulation of the price of coal in London, and included the following remedy for an anticipated result: "And if any ingrosser or retailer of such coal shall refuse to sell as aforesaid, that then the said Lord Mayor and aldermen and justices of peace respectively are hereby authorized to appoint and impower such officer or officers or other persons as they shall think fit to enter into any wharf or other place where such coals are stored up; and in case of refusal taking a constable to force entrance, and the said coals to sell or cause to be sold at such rates as the said Lord Mayor and aldermen and justices respectively shall judge reasonable, rendering to such ingrosser or retailer the money for which the said coals shall be so sold, necessary charges being deducted." Certainly there is some ground to support the conclusion of the legislature as expressed in the act, that the measures are reasonably necessary to the accomplishment of the principal purpose of the act, and the Supreme Court has said,[7] "If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did."

If the requirement of compulsory production and offer for sale, enforced through the alternative previously referred to, can be sustained under this principle, a power of the State, valueless alone, becomes valuable, and the State has a means of protecting its people from extortion on the part of

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[3] 211 U. S. 31.

[4] 237 U. S. 52.

[5] For the purpose of this discussion, it is assumed throughout that the first case involving the law was correctly decided and that the Supreme Court will affirm the power of the State to regulate the price of coal.

[6] 16 & 17 CAR. II, c. 2 (1661). Also 2 W. & M., c. 7 (1690), and 7 & 8. WM. III, c. 36, (1696).

[7] Munn v. Illinois, 94 U. S. 113; Antoni v. Greenhow, 107 U. S. 769.

those controlling the supply of a necessity. Is the part of the power which makes the whole worth utilizing, being sustainable as an exercise of the police power, to be rendered invalid because the entire production of coal within the State cannot be shipped in interstate commerce if the act is enforced, without subjecting the operators to the penalty of retiring? The only principle which seems to offer any hope for the act is the third of those already referred to, that an otherwise valid use of the police power is not invalid although it interferes with interstate commerce, provided the interference is incidental and there is no Federal law conflicting.

The basis upon which the legislature proceeds is a recognition in the act[8] that the coal deposits of the State are sufficient to supply all legitimate demands of intra- and interstate commerce for decades to come, and any intention of prohibiting the sale or transportation of coal in interstate commerce is disavowed. The evil which the law seeks to combat is not the shortage of supply, but extortionate charges. The purpose is not that the State should obtain a larger supply of its coal than before, at the expense of other States, but that the regulation of prices may not become futile by driving the commodity away from the local markets. The interference is incidental, therefore, at least in the sense that it is not the primary purpose of the act.

Moreover, if the statement of the legislature concerning the deposits of the State is to be taken at face value, the quantum of interference may not be great. It is easily conceivable that in many instances individual operators might be unable to dispose of their entire output in interstate commerce, however much they might desire to do so. However, there may be numerous other cases where the operator could dispose of his entire production in interstate commerce if he were free to do so. Here there would be an undoubted interference.

What is the meaning of the term "incidental" as used in cases where the principle has been laid down? The cases in which some form of the proposition has been stated are innumerable, but few of them are of any value in the present discussion, and none is closely analogous. Two very small groups of cases approach the question from opposite sides, but there is a wide gap between, and somewhere in that gap lies the solution of this problem. In the one group are such cases as *Geer* v. *Connecticut*;[9] *New York ex rel. Silz* v. *Hesterburg, supra; Hudson Water Co.* v. *McCarter*,[10] and *Sligh* v. *Kirkwood, supra.* In the other are *West* v. *Kansas Natural Gas Co.*;[11] *Haskell* v. *Kansas Natural Gas Co.*;[12] *Corwin* v. *Indiana, etc., Mining Co.*,[13] and perhaps *Leisy* v. *Hardin*[14] and *Schollenburger* v. *Penna.*[15]

[8] Act Creating a Special Coal and Food Commission of Indiana, Section 10.
[9] 161 U. S. 619.
[10] 209 U. S. 349.
[11] 221 U. S. 229.
[12] 224 U. S. 217.
[13] 120 Ind. 575.
[14] 135 U. S. 100.
[15] 171 U. S. 1.

Geer v. *Connecticut* and *New York ex rel. Silz* v. *Hesterburg* deal with statutes enacted for the protection of game, a valid exercise of the police power. In the first case, a statute forbidding the shipping of game out of the State during certain seasons of the year was sustained. The second has already been discussed. In both the objection was made that the statutes directly interfered with interstate commerce. In both the statutes were sustained because the interference was held to be incidental.

In *Hudson Water Co.* v. *McCarter,* a New Jersey statute forbidding the piping of water out of the State was sustained as a valid exercise of the police power and an incidental interference with interstate commerce. In *Sligh* v. *Kirkwood,* a Florida statute already discussed was sustained on the ground that the protection of the citrus fruit industry of the State was a valid exercise of the police power and that the interference with interstate commerce was incidental.

All of these can be differentiated from the case of coal. The game and water cases can be distinguished on the ground that the owner in both cases has but a qualified property right. *Sligh* v. *Kirkwood* can be differentiated on the ground that it is within the power of the State to say that unripe fruit is not a legitimate article of commerce.

A discussion of *West* v. *Kansas Natural Gas Co.* sufficiently covers the principle for which the other group stands. The State of Oklahoma had passed an act prohibiting the piping of oil and gas out of the State for the purpose of conserving the supply for its own people. The Supreme Court of the United States held (three justices dissenting) that the act was a direct interference with interstate commerce and invalid. The following propositions were quoted with approval: "No State, by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof. No State, by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on." This case limits the principle upon which the coal law depends. However advantageous it may be to the people of a State to retain within its borders a natural resource, it cannot be done. Between the two groups of cases there seems to be a wide gap, and it is believed that the Indiana law will fall somewhere within that gap. In order to be sustained it must be differentiated from the second group of cases. Two distinctions at once suggest themselves. The primary purpose of the Oklahoma law was to prohibit the exportation of the resource. The primary purpose of the Indiana law is to make price regulation a benefit and not a detriment to the people of the State. Then, too, there is an obvious distinction in the quantum of the interference. The Oklahoma interference was complete. The Indiana interference may be very slight.

In *New York ex rel. Silz* v. *Hesterburg,* Justice Day distinguished the case at bar from *Schollenburger* v. *Penna.,* where a law prohibiting the importation of oleomargarine, a legitimate article of commerce, was held invalid, though for the purpose of protecting the welfare of the people of the State,

on the ground that in the latter case the interference was the direct purpose of the act, whereas in the former the purpose was the protection of the local game and the interference was incidental. The language of the court, both in this case and in *Sligh* v. *Kirkwood,* seems to indicate that the term incidental refers, not to the quantum of the interference, but to the primary purpose. If this is the test to be applied, the Indiana law is clearly distinguishable from the Oklahoma law. From the legalistic standpoint, the question would seem to be rather doubtful, with no case directly in point or very close. Language is to be found in the two widely divergent groups of cases which mark the bounds within which the question falls, tending to support the law on the one hand and perhaps to declare it invalid on the other. Inasmuch as the Supreme Court found sufficient merit in the Oklahoma law to result in a split, there would seem to be at least a fighting chance for the Indiana law.

On the economic side, the case for the law may be summed up as follows: The starting point is: The State has the power to regulate the price of coal. In the absence of regulation a certain amount of coal is being supplied to the people of the State at extortionate prices. If the same amount of coal can be obtained at the reasonable price set by the State, the people will be greatly benefited and the people of adjoining States will not be harmed. If coal cannot be obtained at the price set by the State, the law will, of course, be extremely detrimental. Provided the State is to have the power of regulating prices at all, and provided it confines itself to the necessities of the case, why should it not be able to interfere with interstate commerce to that extent. The principle that an otherwise valid exercise of the police power can be sustained, though it incidentally interferes with interstate commerce developed when the conception of the police power was confined to health, morals and safety. Since then the police power has developed considerably beyond that conception. Logically, it follows that the principles which developed in the early conception of the police power and furthered the effectiveness of its exercise should not stand still, but should be extended into new fields when the necessity arises. A. W. B.

VOLUNTARY PAROL TRUST WITH IMPLIED POWER OF REVOCATION.—In the recent case of *Russell's Executors* v. *Passmore,* 103 S. E. 652, in the Supreme Court of Appeals of Virginia, it appeared that the donor had made a voluntary transfer of certain bank stock about six months before his death. Several years later, the donee having died without making any disposition of the stock, the donor's infant children brought suit in the name of their guardian against the donee's executors to establish an alleged secret parol trust of the stock. There were two reputable witnesses who knew something about the transaction. One of them, who was present and participated in the initial transfer of the stock, testified that the stock was to be held "in the event of the donor's death" for the benefit of the donor's eldest son. The other witness, who was the donor's administrator and was present at his death, testified that the donor said a few hours before his death that the